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Reconciling the Private Labour Law System with the Public Labour Law System through the New Labour Act 2024: A Futile Attempt by the Legislature

by

Senthebane Nathanael Moerane: 202410799

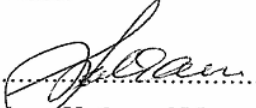
A Mini Dissertation Submitted in Partial Fulfilment of the
Requirements for the Degree of Master of Laws (LLM) in the
Faculty of Law, at the National University of Lesotho

Supervisor: Dr Letzadzo Kometsi

May 2025

DECLARATION

I, Senthebane Nathanael Moerane, hereby declare that this mini dissertation is submitted to the National University of Lesotho, Faculty of Law, in partial fulfilment of the requirements for the Master of Laws Degree and has not been submitted to any other academic institution. This dissertation presents my original research findings, with proper acknowledgement of external sources cited.


.....
Senthebane Nathanael Moerane

DATE: 30TH MAY 2025

This dissertation is approved by the Supervisor

Supervisor Dr Letzadzo Kometsi

ACKNOWLEDGEMENTS

Gratitude and glory go to Heavenly Father for strengthening and giving me power, wisdom and courage to complete this research. To the Faculty of Law at National University of Lesotho and lectures for their authoritative guidance through out the study period, more especially My Supervisor Dr Kometsi who made this work possible and Coordinator Dr Garufu for his patience and always bestowing his attention to me. Advocate Marealeboha Makau and Dr Halahala who edited the entire dissertation.

Finally, I would like to thank my wife, my daughter and son and special thanks to my colleagues for their support and letting me through difficult times during this research journey.

I thank you all.

ABSTRACT

The Labour Act 2024 is a comprehensive statute regulating employment relationship for both private and public sector employment. The rights contained in the statute are those recommended by International Labour Organisation ILO and other international bodies such as Southern African Development Community (SADC) including the Constitution of Lesotho. This study which is a doctrinal based on desktop is subject to critical evaluation and analysis of the Labour Act 2024 by examining the inconsistencies affecting the Right to Organise and Collective Bargaining in the comparative analysis of Labour Act 2024 and the Public Service Act 2005 towards limitations and subjective approach. More emphasis will be on the legislative attempt to regulate both systems in the same legal framework which is regarded as failed attempt, and the conclusion suggested the way Public Service Act designed in regulating employment in the public sector remain the impossibility to address the conflict of laws towards protection of workers' rights. The concerns include the right to organise and collective bargaining, right to strike and to form of join trade unions in the public sector employment.

ACRONYMS

- I. CBC** - Collective Bargaining Convention, 1981 (No. 154)
- II. DC** - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- III. FAPROC** - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- IV. ILO** - International Labour Organisation
- V. LA.** Labour Act 2024
- VI. LRA.** Labour Relations Act 1996
- VII. LRC.** Labour Relations (Public Service) Convention, 1978. (No 154)
- VIII. LUPE.** Lesotho Union of Public Employees
- IX. NACOLA.** National Advisory Committee on Labour
- X. PAJA.** Promotion of Administrative Justice Act 2000
- XI. PSA.** Public Service Act
- XII. ROCBC.** Right to Organise and Collective Bargaining Convention, 1949 (No.98)
- XIII. SADC.** Southern African Development Community
- XIV. WTO.** World Trade Organisation
- XV. ICESCR.** International Covenant on Economic and Cultural Rights

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CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

This study offers a survey of the recently approved Labour Act 2024 of Lesotho through case law, International Conventions and Protocols aimed at regulating the employment connection between the public and private sectors grouped under the same legal framework.

The major instruments that are subject to this study are the Public Service Act 2005, in which public sector employment is regulated without considering employment in the private sector and Labour Act 2024 that regulates the public and private sectors' employment as well as the effects of the repealed Labour Code Order 1992. The purpose of this study aims to examine whether the rights outlined in the Labour Act 2024 safeguard the interests of workers, either for the public sector or the private sectors within the active operations of other legal instruments containing provisions that conflict with some of the sections of the Labour Act.¹

Lesotho's labour law underwent significant modifications in the 20th century because of statutes and case law, which ultimately led to the promulgation of Labour Act 2024. With the Act, Lesotho started enacting labour laws that would better safeguard workers' rights in the workplace by adhering to the recommendations of the international instruments such as International Labour Organisation (ILO) and the protocols of the Southern African Development Community (SADC). By repealing the Labour Code Order 1992, which expressly controlled a relationship of employment for the private sector, though with limited employment rights as to public sector, the legislature intended to provide equal protection for both sectors with the Labour Act 2024. The Labour Code Order of 1992, which was in relation to employment in the private sector, was nonetheless hampered by the Public Service Act of 2005 by stating that, it does not apply to public officers.²

Public Service Act 2005 prohibits public officers from engaging in a strike, thereby implicitly barring them from being members of a trade union. However, with limited rights, they are allowed to establish their own staff association³, something which conflicts with the purposes

¹ Public Service Act 2005, section 19, 21, 22

² Section 30 of the Public Serviced Act, it is provided that the Labour Code Order is not applicable to public officers.

³ Public Service Act 2005 Section 19, 22 and 30.

of the Labour Act that united the rights of public employees and private sector employees together.

Equally noticeable is the concept of establishing which statute takes precedence between the Public Service Act 2005 and the Labour Act 2024 towards the protection of the rights of public sector employees. Worth mentioning here is the right in relation to organisation and collective bargaining, the right to strike and the right to trade union whereby the Labour Act in section 221 (1) provides as follows that:

“221. (1) Any rule, regulation, or law about labour and employment matters that was in effect before this Act’s implementation and that contradicts the implementation of its provisions will not be applied in any case under this Act.”

The Labour Act 2024 is a comprehensive legislation that regulates employment in both the public and private sectors and excludes members of security organs who are also public officers.⁴ Security sectors in Lesotho are formed from members of the Army, Police, National Security and Correctional Officers. It is provided that the Labour Act shall not apply to a person who is a member of the security agencies such as (a) Lesotho Correctional Services. (b) Lesotho Mounted Police Services, (c) National Security Services and (d) Lesotho Defence Force.⁵

The provisions of Section 3 above is the harmonisation of Section 2 of the repealed Labour Code Order 1992 in which application was in relations between the private sector employment and any employment under government or any public authority without consideration of members of the then Royal Lesotho Defence Force, Royal Lesotho Mounted Police or any other disciplined forces.⁶ The contract of employment, during the 18th and 19th centuries, was governed by private law and fell under the common law contract of letting and hiring. That significantly governs worker and employer relation to the extent that organised and collective bargaining and right to be members of trade union were not considered as aspects of employment law.⁷

Under the common law, the strike was considered a breach of duties to provide services by an employee to the employer, and was punishable by dismissal and by replacement, or other form

⁴ Labour Act 2024, section 3 (1).

⁵ Labour Act 2024, section 3 (2)

⁶ The Labour Code Order 1992 section 2 (1) and (2).

⁷ Brassey M, “The Nature of Employment” (1990) 11 ILJ 889 at 893

of punishment, such as interdiction of an employee, whether within the public or the private sector employment.⁸ It was held in the case of the *National Union of Mineworkers v Commission for Conciliation, Mediation and Arbitration*⁹ that the strike under common law amounts to a breach of contract and can be branded as misconduct for dismissal of the strikers.¹⁰ This kind of employment contract did not guarantee the protection of workers' rights, thereby recommending the intervention of international bodies such as the International Labour Organisation Conventions and Recommendations (ILOCR) for the member states to formulate and implement policy by national laws and upon consultation with employees and workers organisations.¹¹

The enactment of the Labour Act in Lesotho represents a national effort to adhere to the international laws regulating the employer and worker relationship. As the preamble of the International Labour Organisation (ILO) states, "It is an imperative to regulate working conditions to address the injustice in the conditions of labour." Lesotho ratified the convention concerning the rights enshrined therein. Another important international instrument related to employment laws is C151-Labour Relations (Public Service) Convention 1978, which Lesotho ratified. Specifically, Article 4 states, "public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment." The preamble of the articles acknowledges issues regarding definitions and the scope of any international instrument, as private and public employment differs in many nations, and there have been interpretative challenges concerning the application of pertinent provisions of the 1949 right to organise and have collective bargaining convention to public employees.

The Labour Act 2024 provides for trade unions and bargaining councils in respect of employment relationships that employees enjoy as a fundamental right. Therefore, shortcomings of the Act are the purposive exclusion of other public employees from the application of this Act. These include security agencies and other services identified as essentials.

The main purpose of the newly enacted Labour Act 2024 has been to combat ill-treatment of workers and balance the probabilities between employers and employees. This Act aimed at

⁸ *ibid*

⁹ [2017] ZALAC 73 at para 5

¹⁰ *ibid*, para 17

¹¹ Employment Relationship Recommendation, 2006 (No R. 198) article 1 as ratified.

harmonising the rights of employees and employers either for the private sector or the public sectors by compiling rights in the same legal framework. There are major concerns, brought about by the new legislation. However, only four inconsistencies are to be dealt with in this study. Firstly, the focus has been on the regulation of the public sector employment in the same instrument as employment in the private sector. Considered are on the guidelines relating to the procedures and expectations towards protecting individual employees' rights.¹² Secondly, the purposive exclusion of security sectors and limiting the workers' rights based on essential services from newly enacted Labour Act 2024 on the right to organised and collective bargaining. Thirdly, the inconsistencies between the Public Service Act 2005 and the provisions of Labour Act 2024 that undermine the ideologies of International Labour Organisations Employment Relations Recommendation¹³ which undermined the compilation of public sector employment with private sector employment in the same legal framework in Lesotho. The significance of the newly enacted legislation is to combat gaps in the principles of equality brought about by the repealed Labour Code Order 1992. Lastly, the concept of workers' welfare, such as pension benefits cannot be uniformly asserted and applied between the private and public sectors. To a certain extent, the impact of the Constitution justified the limitation of some clauses of the Labour Act 2024. This is because the Labour Act repealed the Labour Code Act 1992, whose major focus was on the employment relationship within the private sector and legal instruments governing employment within the public sector were not repealed; rather, they specify a different approach when dealing with protection and procedural requirements in labour rights.¹⁴

1.2 STATEMENT OF THE PROBLEM

This study investigated the effectiveness of the reconciling employment relationship for two sectors of employment, being the private and public sectors in the same legal framework and analysis on whether there is likelihood for public sector employees to exercise the right to organise and collective bargain in the same method as the private sector employees.

Although the courts and legislature, with the pressure from academics, made efforts to resolve the debate on the limitations of the right for public officers to organise and have a collective

¹² Section 30 Public Service Act 2005 states that Labour Code Order does not apply to Public Officers. This brings an inconsistency when it comes to Labor Act as the direction to the Labour Code Oredor 1992 shift to the newly Labour Act 2024.

¹³ 197 of 2006

¹⁴ To mention repealed Public Service Act 1995, Public Service Act 2005, public service regulations 2008 and others.

bargain, the situation has not yet reached the point of enjoying the same rights as the private sector employees. This is the crucial problem that needs special attention to combat inequality and violation of the right to equality as entrenched in the Constitution of Lesotho. There is an obligation of Lesotho for the critical evaluation of the impact of the Public Service Act 2005 in comparison with the Labour Act 2024 and other statutes regulating the public sector employment. The right to organise and bargain collectively, as well as associating with or forming trade unions of choice without limitations creates misperception when interpreted on the above statutes where the concern is on the public sector as there are some limitations of such rights to some of the departments that are categorised as essentials and with the belief that such rights if not without authorisation would likely pose threats to national security and safety, possibly endangering the population or any part of it.

Although the Labour Act does not concern employees in the security agencies, as elaborated, the application to public officers does not guarantee the right to organise freely and bargain collectively, even the right to strike, as the existence of the Public Service Act 2005 remains an obstacle. The Newly enacted Labour Act does not bring any changes to the matters made concerning the Public Service Act regarding the Labour Code Order 1992, not does it accommodate the grievances of public officers that were of a concern in the case of *Lesotho Union of Public Employees v Speaker of the National Assembly and others*.¹⁵

Close attention in this study has been to other government departments that are excluded from the application of Labour Act 2024, and those that require special and essential treatment. The right to organise a collective bargain as guaranteed in the Public Service Act for public officers, though, based on the provisions of the Constitution, has some limitations, while private sector employees enjoy such rights without any limitations. Such limitations are in respect of direction to form and join the association in the manner described in Societies Act 1966 and with the threshold of fifty per cent of its members, the number that is too high based on number of employees for public sector.

1.3 HYPOTHESIS

The study's main objective was to distinguish between employment contracts at common law employment regulated by statute and much attention be on the employees' rights for private

¹⁵ Lesotho Union of Public Employees v Speaker of The National Assembly and others (CIV APN 341 OF 1995) 1997 LSHC 61 (6 August 1997) (3)

and public sector as unified and reconciled together in the Labour Act 2024. The relevant legal instrument, which is a point of departure in analysing this research question, is Labour Act 2024 in comparison with Public Service Act 2005 to seek alignment with the provisions of section 16 (1) of the Constitution of Lesotho. The emphasis is on addressing the discrepancies in Lesotho Labour laws that may affect the rights of certain public sector workers in contrast with those in private sector, and to find the gaps in the Labour Act's provisions and inconsistencies between the labour law of Lesotho and the recommendations of International Labour Organisations regarding workers' rights. To commence with the theoretical background and origin of Lesotho Labour law under employment contract under common law, and active regulations and conformity with the international recommendations entailed in the International Labour Organisation and Southern African Development Community Protocols (SADC) regarding labour issues among member states.

Also, by analysing the rights generally as contained in the Labour Act 2024 in consultation with rights in the national Constitution, especially Sections 29, 30 and 31 relating to employees' rights, emphatically the right to Freedom of Association and Trade Unions. The investigation focused on the equal protection of the law to ensure that workers equally benefit from the law as harmonised, and to include retirement benefits. The retirement age in the Police Service in Lesotho differs according to ranks, as the law directs that retirement for senior officers is fifty-five years, whereas for the subordinate officer it is fifty years, the provisions which necessitate justification for such inequalities.¹⁶

1.4 OBJECTIVES OF THE STUDY

The differences in the relations among employees in the public sector and repealing of the former Labour Code Act 1992 should be visited to ensure the uniformity for rights and protection from unfair labour treatments. Without necessarily interpreting the statute, worth considering here are the legal implications for the employees in respect of challenging unfair labour practices for enjoying their constitutional rights.

The study aims to balance the interests of workers for both public and private sectors to seek uniformity and enjoyment for being members of workers' organisations and trade unions. However, workers excluded by the Labour Act, such as members of the Army and National

¹⁶ Legal Notice No. 5 of 2004, section 3.

Security, will not find the comfort of being collectively represented when there is a labour dispute. Although not expressly stated in the Act that members of Lesotho Mounted Police Service, of Lesotho Defence Force Police or National Security Services even the Correctional Services are not allowed to be members of any trade union, and joining of association other than the one provided in Police Service Act 1998 and other regulatory statute, the provisions limited their rights and independence, as compared to the rights emphasised in the Labour Act 2024.

The study, therefore, intended to justify the need for further enhancement of public sector employees' rights to have equal recognition as employees in the private sector without limitations. The study also set out to address the employment rights as compiled in the Labour Act, together with limitations in the Public Service Act, thus calling for amendment to do away with the shortcomings of Labour Act 2024 and Public Service Act 2005. The provisions that could be addressed in relation to Section 16 (1) of the Constitution should be identified and corrected to conform with the International Labour standards and Southern African Development Community Protocols.

1.5 RESEARCH METHODS

This is a subjective doctrine-based, desktop study which described and critically assessed the constitutional framework, labour laws, case law, books, journal articles and other comparable sources locally and internationally and the international instruments. The study has been based on desk and library sources, specifically examining primary sources, mostly on Labour Act 2024 and other related statutes. The study is subject to critical evaluation of employment contract under common law and the impact of new and repealed statutes. With such a critical analysis of the entire Act, the study aimed at reconciling the public and private sector employees. On this basis, the study went further to expose the extent to which the same legislation could have excluded some employees from others, thereby overlooking the prevailing public service regulations, such as Public Service Act 2005 and 2008 regulations.

1.6 THEORETICAL CONTEXT

Before enunciating on the research question and examining the core and features of this study, this study serves to set the general theoretical framework of workers' rights, focusing on the public sector than the private sector. Central are the safeguards of workers' rights for fair labour practices, the right to organised groupings and right to freedom of association, the right to strike

and to trade union subject to the constitutional limitations. The International Labour Organisation (ILO) set standards of appreciation of rights to member states, and Lesotho, like other member countries of the International Labour Organisation, ratified many International Conventions. The workers' rights in the public sector are contained in Public Service Act 2005, with some provisions conflicting with workers' rights generally applicable to the private sector. With the promulgation of Labour Act 2024, the legislature had the intention to regulate both the public and private sector employment within the same legal framework. Nevertheless, Public Service Act 2005 has remained an obstacle in terms of ensuring such rights; rather, the Act applied some control measures and imposed limitations.¹⁷

1.7 STRUCTURE OF THE STUDY

This Chapter has introduced the study, thus identified the problems, and provided objectives and methods for the study. The chapter has also presented the background and role of common law, critical examination of Labour Act, ending by outlining the chapters of the study.

Chapter Two will present the concepts of labour rights, theoretical and legal framework, in relation to the International Labour Organisation Recommendations. Exploring the workers right to organises and collective bargaining through trade unions, the chapter will mainly explore the inconsistencies and changes brought about by the new Lesotho Labour Act 2024 concerning public and private sector employment.

Chapter Three will make a comparative analysis of the Labour Act 2024, the repealed Labour Code Act 1992 and the Public Service Act 2005, against the International Labour Recommendations on the workers' Right to Organised and Collective Bargaining, Right to Freedom of Association, Trade Unions and Right to Strike. The focus in this chapter is whether the constitutional limitation of public officers' rights through the Public Service Act accommodates the Labour Act towards regulating employment in the public sector.

Chapter Four considers shortfall of the Labour Act 2024 towards international labour framework, best practices, standards and principles. Constitutional challenges facing the public sector and ways of addressing some inconsistencies.

Chapter Five will concern the conclusions, together with recommendations, based on the main findings of the study.

¹⁷ Public Service Act 2005, section 19, 21, 22

CHAPTER TWO: EVOLVING CHALLENGES OF LESOTHO LABOUR LAW THROUGH LABOUR ACT 2024

2.1 ORIGIN OF LESOTHO LABOUR LAW

The discovery of Lesotho's labour legislation and advancements in the protection of workers' rights in both public and private sectors are the main topics of this chapter. The fiction of International Organisations, like the Southern African Development Community (SADC) and the International Labour Organisation (ILO), is to encourage member states to involve workers' associations and trade unions for the purposes of collective bargaining. The emphasis is on resolving current problems, regarded as shortcomings in Lesotho labour regulations concerning public sector employment, the constitutional vulnerability and interpretation of Section 30 of Public Service Act 2005, based on approaches to the Labour Act. The impact on socio-economic rights towards pension laws as promulgation of the new Labour Act 2024 (referred to as the Labour Act) and repeal of Labour Code Order 1992 brought significant changes and transformation in employees' rights, raising inconsistencies between the public and private sector employment.

The labour law of Lesotho was first introduced in 1911 with Native Labour Regulations designed to regulate a work relationship between the Basotho labour migrant workers in South Africa in response to socio-economic challenges¹⁸. The development was first seen in Labour Code Order 1992 and now the new Labour Act 2024 is an existing instrument that contains employees' rights for employment in the private sector as well as employment of the public sector. Recognition was given to informal workers, and some forms of discriminations are considered as aspects of unfair labour practices.¹⁹

This chapter outlines the discrepancies brought by Labour laws, especially the provisions of Public Service Act 2005, when integrated with Labour Act 2024 and Section 16 (1) of the Constitution of Lesotho. The collaboration of two systems aimed at addressing the recommendations of the International Labour Organisation²⁰ and South African Development

¹⁸ Mosito KE: decent Work in Focus: Assessing the Conformity Lesotho's Labour Act, 2024 with the International Labour Organisation (ILO)Agenda and Southern African Development Community Standards/ 10/ not published.

¹⁹ The Labour Act 2024, Section 6 and 7.

²⁰ Employment Relationship Recommendation, 2006 (No. 198).

Community protocol (SADC) on the Imposition to the member states the inclusion of trade unions and employees' associations in their national legislations.

2.1.1 Common Law Employment Contract Lesotho

The rights of employees, as traced far back as in the pre-democratic era, and under the law of contract based on common law, were not comprehensive enough to cater for workers' rights and rights in the employment relationship. The International Labour Organisations intervened and encouraged member states to include, in the national law, the rights that accommodate the recognitions of trade unions, employees' associations and bargaining councils.²¹

The employer and employee relationship in historical times was governed by the law of contract at the common law contract of service, whereby employees lease their services to the employer and receive a salary, thus renting their services. Under Roman law, three types of lease agreements which involve renting of labour services were *locatio conductio rei*, the *location conduction operarum*, which is hiring of services, and lastly, the *locatio conductio operis*, which is the hiring of a piece of work.²² The recognition of employment contract was emphatically provided in the case of the *MEC Department of Health, Eastern Cape v Odendaal and others*,²³ in which AC Basson, J stated that, the contract of employment marked the beginning of the employment relationship between workers and employers, and that, the employment relationship will be established once the two parties have concluded the agreement on the essential component of the employment contract which includes, the employees' willingness to provide labour under employers' supervision in exchange for payment.²⁴

Generally, the employment contract is considered as the renting of services by an employee to the employer, and the employee sacrifices their freedom by placing themselves to the authority and supervision of the employer.²⁵ Under the contract of letting and hiring or *locatio conductio operis* the relationship is between employer and an independent contractor who undertakes to perform a certain task for the employer in return for a reward or a payment, and thus they decide on how and when to do such a task without being subject to an employer.²⁶

²¹ Ibid.

²² Fourche MA. Legal principles of contract and negotiable instrument, 5th ed at 178 lexis Nexis Butterworths.

²³ MEC Department of Health, Eastern Cape v Odendaal and others [2008] ZALC 161 para 49.

²⁴ Ibid at para 49.

²⁵ Ibid.

²⁶ Ibid.

The distinction that was observed as a gap between the public sector employment and private sector employment is about the impossibility of enforcing workers' rights where there is no specific legislation. The contract of employment in common law embraces both the employment relationship of the public sector and the private law system, but administrative law governs employment in the public sector.²⁷ The administrative law concept deed is not intended to embrace acts properly regulated by private law as the administrative law is planned to control the exercise of public power. As *Richard Stacey* highlighted, ruling of the judges representing that administrative law does not apply to employment of the public sector leading to impracticalities, as Promotion of Administrative Justice Act 2000 (PAJA)²⁸ states that an administrative action relates to a decision taken by any function (a) must be by a state organ (i) executing constitutional powers (ii) when performing a public function in terms of legislation; thus, it is not difficult to recognise whether an employer is an organ of state.²⁹

The employment relationship among the Basotho nation has been in existence since the pre-colonial era, and prior to 4th October 1966, the day on which Lesotho gained its independence, with some changes brought by the colonial regime. Like any other African countries, the employees were paid in kind. For example, a shepherd would be paid with number of animals within the agreed period, specifically a period of one year was the maximum term.

2.2 PUBLIC OFFICERS' RESTRICTED RIGHTS

The changes and developments in Lesotho labour law brought about by the new Labour Act 2024 embraces workers' Rights that include associations free from distinction and the right to freedom of trade unions subject to the rules of the organisation concerned. That workers in all sectors private, public or informal sector economy, enjoy constitutional rights within the application of the Labour Act. ³⁰ Public Service Act 2005 remains continuous and governs that Labour Code Order 1992,³¹ which was repealed and replaced by Labour Act 2024, does not apply to public officers. Most employees for the public sector are not included in the Labour Act, as some are categorised as the threat to the national security, national health or safety

²⁷ Richard Stacey, "Administrative Law in Public Sector Employment Relationship" South African Law journal (2008), Vol. 125, No. 2 307-30.

²⁸ Promotion of Administrative Justice Act 2000, section 1.

²⁹ Ibid at page 314.

³⁰ Labour Act 2024, Section 8 (1)(2).

³¹ Public Service Act 2005, Section 30

within the public sector.³² According to Public Service Act 2005, public officers will only be members of an association authorised and controlled by the minister in terms of Section 16 (1) of the Constitution, and that a public officers' association will be formed in respect of the requirements of Societies Act 1966.³³ The elaboration of the right of association in Section 8 of the Labour Act conferred to a worker without any distinction, and without prior authorisation of the government to organise freely, and such a right is guaranteed to workers and employees in all economy sectors, including the public sector.

These two Acts are specifically directed to workers, especially in the public sector, but the Public Service Act supersede when talking about the public officers' rights because the written law cannot be abrogated by a disguised amendment or disuse. The fact is that right to be a member of association to the public sector is governed by Societies Act 1966, which was formulated generally not considering the recommendations of International Labour Organisation and not even considering Southern African Development Community (SADC) protocol in Article 6 which emphasise that, employers and employees possess the right to employers' association or have a choice of a trade union as well as engaging freely in the activities and programmes of such trade unions or associations.³⁴

2.3 CONSTITUTIONALITY OF WORKERS' RIGHTS

The inconsistencies in the national legislation which cannot be fixed by the newly enacted Labour Act were brought by the existing Public Service Act 2005 in Section 21, which exclude a large number of employees within the public sector such as members of the Army, Police, Correctional Services and National Security.³⁵ All the legal instruments enacted during the colonial regime and post-1966 independence did not cater for the formation of associations and trade unions for workers, neither were the public sector employment instruments considered the same as employment for private sector. The law of contract was considered the best to regulate employment in the private sector, and the rules of administrative law and natural justice were best to regulate employment in the public sector. Even nowadays, administrative law plays a leading role in the administration of justice in the public sector.

³² Ibid on section 3.

³³ Public Service Act 2005, Section 22.

³⁴<https://ceosa.org.za/understanding-the-right-to-freedom-of-association-in-the-collective-bargaining-arena/>.

³⁵ Labour Act 2024, section 3

The employees' rights are granted by the 1993 Lesotho Constitution, which is the highest law that complies with international norms. It confers to every person who is a citizen of Lesotho the right to earn a living through work that they freely choose or accept, according to Section 29 of the Constitution. Section 30 deals with the adoption of policies meant to secure just and favourable working conditions, such as decent living, fair and equal wages for work of equal value, better working conditions. The most important provision of the Constitution when focus is on the workplace rights is Section 31, which the state is bound to take proper steps to reassure the establishment of autonomous trade unions aimed at safeguarding the interests and rights of workers as well as fostering healthy labour relations and equitable employment. To some of public sector workers, limitation of a right to form associations as in Public Service Act 2005 in Section 31 is a result of Section 16 (2) of the Constitution which states that, no public function or power regulated under any law which is inconsistent with or in violation of any other law is supposed to cater for the interests of defence, protection of the nation, order, ethics of public health in (a), and is to protection of the rights in (b) and freedom of the nation, and lastly, in (c) to enforcing limitations upon public officers.

2.4 IMPACT OF SECTION 30 OF PUBLIC SERVICE ACT 2005 OF LABOUR ACT 2024

In Section 16 (2), the Constitution tolerates organs of state to implement regulations which are not compatible with the ILO, Employment Recommendations. The results are to be observed on the interpretation of Section 30 of the Public Service Act 2005, which states that Labour Code Order 1992 does not apply to public officers. Even though the Labour Code Order 1992 was repealed, the definition extends to the newly enacted Labour Act 2024, which replaced the Labour Code Order. Again, Sections 21 and 22 of the Public Service Act³⁶ afford civil servants the right to form a public officers' association that is over fifty per cent of the overall body of public officers for collective bargaining, and such an association must be formed in relation to the requirements of Societies Act 1966 and must be under Section 16 (1) of the Constitution. In the Societies Act,³⁷ an association is included in the definition of society under Section 2, which states that a society incorporates any club, company, partnership or association of not less than ten persons, without specific character or object. On the other hand, the Labour Act 2024 in Section 8 states that,

³⁶ Public Service Act No. 1 of 2005.

³⁷ Societies Act No. 20 of 1966.

“(1) A worker and an employer shall, without any distinction, have a right of association and, subject only to the rules of the organisation concerned, to establish and join organisations of their choosing without the previous authorisation of the Government.”

“(2) The right of association referred to in subsection (1) is guaranteed to a worker and an employer in all sectors of the economy, including the public sector and the informal economy”

The Labour Act in Section 3 is well-matched with the Constitution to the extent that some members of the public sector are not included in the Labour Act and presumably for trade unions and workers associations. There are assumptions that trade unions encourage their members to participate in strikes and public protests, which is a threat to national security or public safety and to health contemplations. The same route was tackled in the application of the Labour Relations Act of the Republic of South Africa, whereby members of the army challenged the constitutionality of the Defence Act,³⁸ which specified that members of the army are prohibited from joining a trade union.³⁹ The pronouncement of the Constitutional Court in the case of *South African National Defence Union v Minister of Defence*⁴⁰ presented a comprehensive response in addressing the rights of public sector employees without unjust limitations formed on the kind and nature of employees' work responsibilities

The reasons advanced for the limitation of members of country's security to be members of trade union are that a controlled military force cannot exist if it is associated with trade union. Furthermore, trade unions would have the authority to negotiate collectively on behalf of their members which would encompass the ability to organise strikes. This would potentially compromise the disciplined nature of the Defence Force as mandated by the Constitution. It was highlighted that, “*the South African Defence Force would be weakened as such would be a grave consequence for the security of the South African state.*”⁴¹

The discriminatory section was declared unconstitutional and as such members of the Army in South Africa like other workers enjoys the constitutional right to be members any trade union of their choice without any distinctions.

³⁸ Defence Act 1957, section 126B

³⁹ *ibid*

⁴⁰ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469

⁴¹ *Ibid* at para 32

2.5 DIFFERENT APPROACHES TO PENSION AND RETIREMENT FOR THE PUBLIC AND PRIVATE SECTOR EMPLOYMENT

Although more emphasis in this dissertation is on the workers' rights such as a right to organisation and collective bargaining, it is not the only discrepancies identified that threaten the regulation of the public sector employment in the same legal framework as the private sector employment. Socio-economic factors and related workers' benefits play a vital role in bringing into light inconsistencies and the legislature's failure to observe the rules and recommendations of the ILO. The issue of pension, which is the most prevalent aspect of fair labour practices that requires immediate attention to comply with international standards, has been overlooked to conclude that the newly enacted Labour Act pass the threshold to regulate both systems of employment.

The International Labour Law under the auspices of the International Labour Organisation requires that a pension system should provide income security upon retirement and must be through a mix of contributory and non-contributory schemes to combat poverty at old age.⁴² The pension schemes must extend coverage to informal workers and vulnerable populations.⁴³ It is also provided in the International Labour Organisation adopted on the 15th June 2006 in Geneva in which Lesotho ratified that, members should create and implement national policies that ensure workers who perform labour within the framework of an employment relationship are effectively protected by examining relevant laws and regulations at suitable intervals and, if needed, modifying and clarifying their scope.⁴⁴ Under Section 30 of the Constitution, it is provided that, in attaining objective and constructive conditions of work, precise policies must be adopted, including pension and retirement. Benefits for women must be equal to those guaranteed to men, and an equal pay considered for work.

It has long been a debate that the repealed Labour Code Order falls short in observing the principles of common coverage in labour matters by excluding civil servants and persons who are in informal employment.⁴⁵ The same applies to the new Labour Act 2024, even though informal employment is now covered, a large number of public employees are still excluded.

⁴² Ibid note 44 above

⁴³ <https://www.issa.int/analysis/reforms-africa-extend-contributory-old-age-pensions-difficult-cover-groups>

⁴⁴ Article 1

⁴⁵ KE Mosito/ a Panoramic View of the Social Security and Social Protection Provisioning in Lesotho/ 2014/ PELJ.

Lesotho, like any other country, adopted the International Labour Recommendations, especially social protection floors recommendations, and introduced the Old Age Pension to achieve social protection. Only Seventy-year-old citizens and above benefit from this pension, and before the introduction of the Old Age Pension, only the war veterans and civil servants, excluding teachers and certain categories of casual employees, were recipients of pension. In the private sector employment in Lesotho, pension is not mandatory, but a severance pay is provided under the Labour Act, and previously in the repealed Labour Code Act 1992. However, the pension laws, especially the old age pension, do not conform with the labour values because the mandatory age of retirement, either in the private or the public sector, is a minimum of sixty years⁴⁶. The old age pension is provided for individuals of seventy years of age and above. Workers who are not eligible to receive a pension from employment after retirement at the age of sixty years will have to wait ten years before being considered for the old-age pension.

The law provides that an old-age pension can be received by a public sector employee whose monthly pension accrued to him through contributions is lower than that of the old-age pension. This will also negatively hamper the employee because others must wait for more than ten years with that lower income until such time when they reach seventy years. This is so because the retirement age in the public sector begins at the age of forty for members of the Lesotho Mounted Police Service⁴⁷ or the army who decides to take early retirement. Else, they would wait for twenty years if that is the case. The mandatory retirement is fifty years for the police of subordinate ranks and fifty-five for higher-ranking officials⁴⁸. This is an indication that the old-age pension does not comply with the requirements of the international labour standards in that, there is a gap after retirement and social assistance of the old age pension. Therefore, a person of sixty years and above, which is below seventy years, is not employable. It is also difficult for them receive social assistance.

The mandatory retirement age stated in Labour Act 2024 is 60 years.⁴⁹ It is stated in Section 3 that the Labour Act applies to service in relation to both the public and the private sector, yet it does not apply to members of the National Security Services, Lesotho Mounted Police Service, Lesotho Defence Force and members of Correctional Services. This is because the law

⁴⁶ Labour Act, Section 130 (2) (e)

⁴⁷ Legal Notice No. 202 of 2003 Regulation 11(1)

⁴⁸ *ibid*

⁴⁹ Labour Act, Section 130 (2)(e)

regulating those institutions requires the members to retire at the age not stipulated in the Labour Act. The International Labour Organisation requires member states to include, in their local legislation, the provisions that allow an employee to decide whether to leave the labour market and receive an old-age pension upon reaching a certain age, specifically the minimum of sixty years. The SACD protocol on Employment and Labour provides that every person or worker who has attained a retirement age, and who but is not eligible for a pension or lacks alternative means of support, shall be entitled to sufficient social assistance specifically designed to meet basic needs including medical care.⁵⁰

With the newly enacted legislation, workers are forced to retire upon reaching sixty years or at any time after attaining sixty years in agreement with the employer. Such an employee leaving employment at any age before reaching seventy, is not legible to receive the old-age pension even if it is not provided for by the employer.

2.6 RIGHT TO FORM AND JOIN TRADE UNIONS AND BARGAINING COUNCILS

It is generally accepted that all employees have equal rights as entrenched in the Constitution. However, the concept of reconciling the private labour law system with the system of private law in the newly enacted Labour Act requires special attention. The Labour Relations (Public Service) Convention⁵¹ was adopted on 27th June 1978, in consideration of the gaps between the public sector and the private sector, and in consideration of difficulties in interpreting the right to organise and the collective bargaining convention⁵² to public servants. Much consideration was placed on the public servants whereby article five was adopted, which guarantees the right to form an association and an independent organisation from public authority and protection from any form of interference from public authority.⁵³

To address discrepancies brought about by the rules of natural justice in labour disputes, several statutes were enacted. The Public Service Act⁵⁴ in which Section 22 (1) stipulates that, public officers may establish a public officer's staff association under Societies Act 1966 for collective bargaining. The Act requires employees in the public sector to have their own public officers'

⁵⁰ Southern African Development Community (SADC) Protocol on Employment and Labour, Article 14 (b)

⁵¹ 1978 (No.151)

⁵² 1949 (No. 98)

⁵³ Article 5 of Labour Relations (Public Service) Convention 1978

⁵⁴ Act No. 135 of 1995

association based on Section 16 (1) of the Constitution, but the repealed Labour Code Order did not apply to public officers in terms of Section 30 of Public Service Act 2005. It is not possible to scrutinise Labour Act 2024 without referring to the repealed Labour Code Order 1992 according to Section 220 of the Labour Act which clearly states that, any legal instrument that was made concerning the Labour Code Order is still applicable, hence the application of the Labour Code (Code of Good Practice) to the new Labour Act 2024 as Section 30 of the Public Service Act⁵⁵ limit the application of Labour Code Order 1992 to public officers. The public officer was defined as a person who is a holder or who is acting in any office within the public service in Section 2 (1) of Public Service Order Number 21 of 1970.⁵⁶

The definition of public officer under Public Service Act 2005 in Section 4 refers to a definition within the 1993 Constitution. Section 154 (1) of the Constitution describes a public officer in the same way as Public Service Order 1970, and further as a person whether acting or a holder in any office of emolument in the service of the King in respect of the Lesotho government. In the repealed Labour Code Order 1992, it is emphasised that, the Labour Code Order applies to the private sector employment and employment within the government or employment by public authority with an exception to a certain category of public servants such as members of the Royal Lesotho Mounted Police, Lesotho Defence Force and others.⁵⁷

The application of Labour Act 2024 to private and public sector employment in terms of Section 2, is not different from the wording and directions in the repealed Labour Code Order 1992 in Section 4. As such, the Labour Act brought some difficulties in explaining the right to association or any organisation for workers as provided for in the International Labour Organisation, and thus compliance with the international standards still under certain restrictions. It is not easy to abandon Labour Code Order 1992 even though repealed, based on the provisions of Section 220 (1) of Labour Act 2024 because the Labour Code (Code of Good Practice) remains an applicable regulation and as a reference from the Act in the awaiting of new the Labour (Code of Good Practice) Act emanated. This is the situation until the Code of Conduct for Good Practice is prepared by the Minister who will consult the National Advisory Committee on Labour (NACOLA) in terms of Section 17 (1) of the Labour Act.

⁵⁵ Public Service Act No.1 of 2005

⁵⁶ Public Service Order 1970 was repealed and replaced with Act No. 13 of 1995 which was also repealed and replaced with Act No.1 of 2005

⁵⁷ Labour Code Order 1992. Section 2 (1)

Under the repealed Public Service Act,⁵⁸ there was a provision which stated that public officers could not be members of a trade union registered under the repealed Labour Code Order 1992. The case of LUPE was launched by the members of the union of civil servants that was formed in terms of the repealed Public Service Order 1970, whose association had to reach the deadlock because of the repeal of the relevant statute. The said provision is not included in the Public Service Act 2005, but no section allows public officers to join any trade union.⁵⁹ The Public Service Act provisions, which refer to the Labour Code Act, will be referred to the New Labour Act 2024 while the Public Service Act is still in operation. These national employment statutes do not comply with the international instruments as far as Article 6 of the Southern African Development Community Protocol on Employment and Labour is concerned. The requirements under Article 6 (a) are that employers and employees possess the right to form and affiliate with an employer's association or a trade union as well as to engage, without any interference, with the events and programmes of their trade union or association.⁶⁰

2.7 CHANGES BROUGHT BY LABOUR ACT 2024

Labour Act 2024 brought a fundamental transformation into Lesotho's legal framework by tackling socio-economic challenges, international labour standards and the gaps in the private labour law and public labour law systems and brought legal measures in reforming the labour law of Lesotho. In the pre-democratic era, Lesotho was ruled under the British Government, which relinquished powers, legal and financial control to the Basotho nation on 4th October 1966.⁶¹ Since then, the government of Lesotho gained its independence and brought some changes to labour law by regulating both the private and public sector employment. Public Service Act Number 12 of 1968 was enacted to regulate employment in the private sector, whereas Public Service Act Number 12 of 1968 was passed as an instrument regulating the public sector. Then it was later repealed and replaced with Public Service Order Number 21 of 1970. Public Service Order 1970 did not recognise trade unions, but the Public Officers Staff Association registered under Societies Act 1966 was recognised to the extent that the general body of public officers subscribed.⁶² The minister was then empowered to withdraw recognition of the Public Officers Staff Association if it ceases to register under Societies Act 1966 or if it

⁵⁸ Public Service Act No.135 of 1995

⁵⁹ Section 31 (2) of Repealed Public Service Act 1995

⁶⁰ Development Community Protocol on Employment and Labour 2014 at page 9

⁶¹ Ibid note 17 above

⁶² Public Service Order 1970, Section 22(1) (b)

does not represent the overall body of public officers within the public service of Lesotho.⁶³ These Acts concerned employment, each addressing labour disputes about the relevant sector, such as Employment Act 1967 about the private sector and the Public Service Act and Public Service Order about the public sector. With the influence of the International Bodies concerning public and private sector employment, Public Service Act 1995, which was later repealed and replaced with Public Service Act 2005, was decreed to comply with the requirements of the International Labour Organisation Employment Relationship Recommendation 2006, 198.⁶⁴

The Act catered for bargaining councils, legal representation, strikes and in Section 15, it conferred power to the minister responsible for the public service to promulgate a code of good practice.⁶⁵ In reply to that, the Code of Good Practice was promulgated in 2008. Public Service Act 2005 is referred to as the mother of other statutes governing other departments of government. Included are the department of police, the local government, the judiciary, the correctional services and others⁶⁶. It was held in the case of the *Minister of Home Affairs and others v 'Mampho Mofolo'*⁶⁷ that provisions of the Public Service Statutes are wide enough to apply to all public officers, including 'police officers according to the definition and the ordinary grammatical meaning of the words.'⁶⁸ There are different instruments governing the departments of government which regulate the work performed under those departments, but none influence effective rights to employees to be members of credit unions and associations other than those authorised by the government based on the provisions of Public Service Act 2005.⁶⁹

As noted earlier, the regulation of employment in Lesotho dates to the pre-colonial era, commencing with the Native Labour Regulations 1911. Its focus was on labour migrations in the Republic of South Africa's mines.⁷⁰ The employment in the private sector was governed by

⁶³ Ibid on section 22 (3)

⁶⁴ International Labour Organisations is devoted to promoting social justice, decent work and internationally recognised human and labour rights.

⁶⁵ Public Service Act 2005

⁶⁶ Section 3 of Labour Act said to apply to employment relationship in the public sector with exclusion of members of Lesotho Defence Force, Lesotho Mounted Police. Corrections and National Security.

⁶⁷ C of A (CIV) 2/05/CIV APN/418/04

⁶⁸ Ibid at para 22

⁶⁹ Section 22 of Public Service Act 2005

⁷⁰ Ibid note 17 above

the Native Labour Proclamation and the Native Labour Regulations 1958.⁷¹ In 1967, the Employment Act was enacted to fill gaps in the Native Labour Proclamation and Employment Act (Procedure) Rules 1970⁷². The employment relationship under those stated Acts was that of a master and servant relationship, with the most applicable law being the law of contract. The employment contract law had gaps between informal employment and forced labour employments. Neither did the law address issues about discrimination based on gender, health status, political affiliation and religious beliefs, nor catering for written contracts. The discrimination was defined in the Discrimination Convention (DC) as including any exclusion made based on colour, religion, race, political affiliation or treatment in employment or occupation.⁷³

Under those listed legal instruments, it was difficult to enforce employment rights as there were no recognised institutions and representative bodies such as trade unions, bargaining councils and dispute resolution bodies. The Labour Act addressed the impugned statutes and afforded workers the right to organise and collective bargaining, the right to strike and join a trade union without distinction and consideration of the private sector over the public sector. The collection of rights and freedoms in the same legal framework, though, introducing some developmental and fruitful ideas to the labour law of Lesotho, does not fully accommodate the public sector, with the Public Service Act, which cannot be amended to align with changes.

2.7.1 Conclusion

Indeed, specialised regulations (Code of Conduct for Good Practice) are yet to be promulgated in terms of Section 217 (1) of Labour Act 2024, which empowers the minister responsible for labour and employment to prepare and issue, and to amend or revoke the Code of Good practice which is aimed for practical guidance in respect of Labour Act 2024 and regulations to be made in respect thereof. The Labour Code (Code of Good Practice) Act, together with its amendments, is still applicable until such time the Code of Good Practice is promulgated in terms of Section 220, which reads thus:

“220. (1) Notwithstanding the repeal made in section 219, a directive, notice or other legislative instrument or document made or issued under any authority of the Labour Code Order, 1992 or its regulations, except in so far as the former are inconsistent with the provisions of this Act, shall remain in force until they shall have expired or have been revoked, replaced or cancelled under the provisions of this Act.”

⁷¹ Basutoland Proclamations and Notices 1958 on page 269

⁷² Laws of Lesotho Volume XV 1970 at page 736

⁷³ Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Article 1

“(2) An institute, body or individual established, elected or appointed under the Labour Code Order, 1992, continues to be established, elected or appointed as such under and for purposes of this Act as if established, elected, or appointed under this Act on the same terms and conditions, except as otherwise provided under this Act.”

Reference is made to Labour Code (Code of Good Practice) 2003, which is still applicable subject to the provisions of Section 220 of the Labour Act 2024. Although the Labour Act applies to employees in both sectors, that is private and public sectors, labour disputes against public service employees are more often governed by the principles of *audi ultra partem* rule under the administrative law or the notion of legitimate expectation whereas administrative law has a limited application on the labour disputes upon employment in the private sector. Specifically, the principles of natural justice have been directly applied without limitations. Demonstration of such was dealt with in the case of *Council of Civil Service Unions v Civil Service Minister* which the decision of the minister removing membership rights of the union was reviewed.⁷⁴ Accordingly, the public sector employees may challenge the decision of the employer, which is a public body, challenging the legality of an action through a judicial review.⁷⁵

The enactment of Labour Act 2024 brought substantial changes and developments in national labour legislations and expanded workers' rights to include those informal employees, prohibits child labour and the worst form of child labour or forced labour.⁷⁶ It protects employees' rights, specifically the right to unfair discrimination about, among other political affiliation or opinion, sexual orientation, disability and HIV and AIDS status. In cases of discrimination about political affiliation in the workplace, special connotation should be emphasised. This is because act applies to employment on both public sector and private sector, though with public officers having a right in respect of political involvement which is limited to the extent that it is considered a breach of code of good practice for a public officer to be an active member of any political party or to support any political party candidate, or speak publicly in showing support for any political structure. However, such a limitation is not provided for in respect of employees in the private sector, which renders its application debatable.⁷⁷

⁷⁴ Ibid.

⁷⁵ Richard W. Painter and others, “Employment Rights” 3 ed, Pluto Press. 2004 at 325.

⁷⁶ Labour Act 2024, Section 9.

⁷⁷ Ibid, section 6.

The ruling out of the Public Service Act remains a conflict of laws as the Labour Act in section 3 states that it applies to employment in the public sector and in the private sector. The conflict is brought by the fact that public officers are confined to be members of associations recognised by the public service and to the extent that responsible Minister approves. Many public officers are excluded in application of the Labour Act. Such an exclusion denies public officers' membership of any trade union of their choice and are required to join the one established under the Public Service Act. Members of the army, police, and national security are excluded and are required to join associations established by their administrative acts, but not to join any trade unions. Section 66 of the Police Service Act prohibits members of Police Service to join or affiliate with any political party, or an organisation, a club association or a group of political nature. They shall not be members of any trade union, whether registered, incorporated or not, anybody associated or affiliated with a trade union or any association which is subject to control or influence the conditions of service of police officers. In analysing the rights of employees as contained in the Constitution and those covered in the legal instruments, it is obvious that what is contained in Labour Act 2024 is not approved in Public Service Act 2005 in relation to employees in the public sector as in the right to be members of trade unions and employees' associations. The Public Service Act 2005 afforded workers such rights as in the Labour Act, but with some limitations rooted in Section 16 (1) of the Constitution of Lesotho.

CHAPTER THREE: OPPRESSED WORKERS' RIGHT TO ORGANISE AND COLLECTIVE BARGAIN UNDER PUBLIC SERVICE ACT 2005

3.1 OVERVIEW OF THE LABOUR ACT

The previous chapter covered the history and improvement of Lesotho labour law, as well as the degree to which the public and private sectors are unified under a single legal framework that governs employment relationships in both sectors through Labour Act 2024. As previously mentioned, Public Service Act 2005 governs the public sector employment while Labour Code Order 1992 governed the private sector. The latter was repealed with the enactment of Labour Act 2024, which united the two sectors under a single law. However, Public Service Act 2005 is still in operation to the extent that it runs concurrently with the Labour Act.

This chapter considers some of the sections of Labour Act 2024. The focus is on the extent of conflict with other sections of Public Service Act 2005, more especially on the right to freedom of association, right to trade union and right to strike for employees in the public sector. Also worth considering is whether the labour law of Lesotho observes employment rights as recommended by the International Conventions and Protocols. The analysis of workers' rights in the Republic of South Africa and Lesotho through case law can be evaluated based on the two constitutional cases, one in each jurisdiction. Comparable case in point is the *Lesotho Union of Public Employees v The Speaker of the National Assembly and others*,⁷⁸ and the case of *South African National Defence Union v Minister of Defence and Another*,⁷⁹ for South Africa. In both cases, the focus was on the right to freedom of association and the right to strike within the public sector employment relationship.

3.2 GLOBAL ENCOUNTERS WITH THE LABOUR ACT 2024

3.2.1 Effects of Wars and the COVID-19 Pandemic on Lesotho Labour Law

The labour law of Lesotho perceives development and progressiveness in the new Labour Act 2024 as compared to previous statutes, including the repealed Labour Code Order 1992, even

⁷⁸ Lesotho Union of Public Employees (LUPE) v the Speaker of the National Assembly, 1997 11 BLLR 1485.

⁷⁹ South African National Defence Union v Minister of Defence and Another (CCT27/98) [1999] ZACC 7;1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999).

though there are minor differences. Labour Act 2024 enactment emerged during the difficult times in which the country has been facing socio-economic challenges. While recovering from the Covid 19 pandemic, which affected the whole world, including highly industrialised countries, there emerged turbulence and conflicts between influential countries, particularly the raging between Russia and Ukraine. Such a volatile situation and conflicts have threatened the global economy, leading to the trade barriers between Lesotho and the United States of America. Lesotho, like any other developing countries, complements its economy with assistance from some European countries, also with trading links with the United States. The declining economy, coupled with a high rate of unemployment, resulting from the global impact on developing countries has led many Basotho to leave for searching jobs in South Africa and other neighbouring countries.

Reconciliation of labour law in the private and public sectors has been in practice in many countries, including Lesotho, which has adopted a legal framework which is congruent with the recommendations of the International Labour Organisation conventions and protocols. As such, Lesotho has combined and regulated both the private and public sectors in the same legal framework, Labour Act 2024. On the other hand, Lesotho has faced many labour-related challenges, instability and power struggles, thus affecting its development and the World Trade Organisation (WTO). In Lesotho, the private sector employment consists of individual businesses, corporations, constructions and non-governmental agencies, while the public sector comprises government institutions. The Labour Act considers employment in both sectors as defined in Section 3, excluding security agencies. The public sector employment, though covered under the Labour Act, has certain limitations when it concerns workers' rights, such as the right to freedom of association, the right to organised and collective bargaining, the right to trade union and to strike.

3.2.2 International Labour Principles

The Public Service Acts provisions that states that, public officers are exempted from Labour Code Order 1992 and Section 22 (1) of Public Service Act 2005, that restrict the right to association in the public sector, and to a certain extent that the association must be formed which is under the Societies Act of 1966 and be recognised when fifty per-cent or more of the overall body of the public officials apply to the minister for recognition for collective bargaining make the right to freedom of association a significant challenge in the public sector compared to the private sector.

The formation of societies in terms of the Societies Act⁸⁰ concern not only labour-related societies or associations, but it is also a general term applicable to any association or an organisation including a political party or any burial societies.

This is because Section 16 (1) of the Constitution in states that:

“Every person shall be entitled to, and (except with his consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes”.

In Section 16 (2), it is provided that the right to form and join association can be limited based on any inconsistencies or if the enjoyment of the rights is in contravention of any law to the extent that the law in question makes provision for the purpose of imposing restrictions upon the public officers. Lesotho ratified several conventions and protocols, including the International Labour Organisation Convention on Freedom of Association and Protection of the Right to Organise (ILOCFAP)⁸¹ and the International Covenant on Economic and Cultural Rights (ICESCR) 1966. The stated Article 2 states that,

“Without distinction whatsoever, workers and employers shall have the right to form and, subject to the regulations of the organisation concerned, join the organisation of their choice without prior authorisation.”

In Article 11, it is stated that every International Labour Organisation member to whom this convention applies takes all necessary steps to guarantee that employers and employees can freely exercise their freedom to organise. Also, Lesotho as a member of the Southern African Development Community (SADC), ratified the protocol on employment and Labour, in which Article 6 states that, the employers and workers shall have the right to form and join associations and trade unions and to participate freely in their activities and programmes. Further consistent with the International Labour Organisation on Freedom of Association, workers and employers have the right to organise and collectively bargain to ensure that they enjoy the right to form and join an employers' association or a trade union and to participate freely in the activities and programmes of such associations or unions. Lesotho also ratified the International Labour Organisation Labour Relations (Public Service) Convention,⁸² which recognises the confidentiality and importance of such government sectors as members of the

⁸⁰ Societies Act 20 of 1966.

⁸¹ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

⁸² 1978 (No. 151).

army and police and recommended that their issues be determined according to the laws of states, while considering international conventions.

3.3 RIGHT TO FREEDOM OF ASSOCIATION FOR PUBLIC OFFICERS

The definition of employee under public sector does not require presumptions that assist to say a person is an employee. Some employees in the private sector, more especially those in the informal employment may be included in the definition of a worker in the Labour Act, but others will have to prove that they are workers. The reconciliation of public and private sector employment cannot be an easy exercise if Public Service Act 2005, is without any amendment in Section 22 (2) which states that, “ an association which is representative of over fifty per cent of the general body of public officers association from within the bargaining unit may apply to the Minister for recognition for purposes of collective bargaining.” Besides, Section 30 of Public Service Act 2005 imposes an obstacle on the rights of employees as contained in Labour Act 2024, and states that, “The Labour Code Order 1992 shall not apply to public officers”. This section, though directed to the repealed Labour Code Order 1992, the direction thereof will be extended to the newly enacted Labour Act 2024 in terms of section 217.

Indeed, the application of Labour Act 2024 to employment in the public sector does not only concerns freedom of association and rights to trade unions, but it also deals with labour issues considering workers associations and trade unions for a transparent labour regulation. The High Court of Lesotho sitting as the constitutional court in the case of the *Lesotho Union of Public Employees v The Speaker of National Assembly and other*⁸³ observed a need to balance the interests of applicants in the process of forming staff association to exercise fundamental human right to freedom of association. In this view, the court highlighted a collective interest in maintaining a strong economy for the country. In this case, the applicant challenged the constitutionality of sections of Public Service Act 1995, specifically Section 31 (2) which prohibits public officers from becoming members of any trade union registered under Labour Code Order 1992 and Section 35, as stated above. In dismissing the application, the then His Lordship, Kheola CJ stated that, the trade unions were both confrontational and unreasonable by usually taking a strike action before exhausting the procedure prescribed by law.⁸⁴

⁸³ Ibid (Lupe v Speaker of The National Assembly) note 59 above.

⁸⁴ Ibid page 20.

The same Section 35 is re-instated in Public Service Act 2005, without any alteration or harmonisation. It is now in Section 30, with the removal of Section 31(2) of Public Service Act 1995, which does not guarantee the right to freedom of association to the extent that public officers can be members of any trade union. A trade union is defined as an association of employees with the primary role as to engage in collective bargaining with their members' employers and representing their members in grievances and disciplinary matters.⁸⁵ The fact that public employees are free to form or join a staff association under Societies Act 1966⁸⁶ and with the required standard of fifty per cent of its members, places an obstacle to the extent that it will be impossible to exercise freedom of association, as stated in the newly enacted Labour Act, as in Section 8. The case of the *Lesotho Union of Public Employees v the Speaker of the National Assembly and others*⁸⁷ infringes heavily on the rights of workers in the public sector by not declaring the provisions of Public Service Act 1995 unconstitutional even though Section 31(2) is not incorporated into Public Service Act 2005, the provisions of Section 35 remains and conflict with Section 3 of Labour Act 2024 which states that, the Act applies to an employment relationship to public officers and the exclusion of a certain department dealing with national safety and security or public health or order.

The restrictions are not in line with the International Labour Organisation and Southern African Development Community Recommendations that require member states to include, in their legislation, the right to freedom of association and the right to form and join associations and trade unions of choice without any authorisation by public authority. The public officers staff association must have at least fifty per cent of a general body to be recognised as an association which differs from what is stated in Labour Act 2024 that trade union, employers' organisation or a bargaining council registration requires at least ten members for trade union, three members for employer's organisation and two members in representation of trade union or employers' organisation.⁸⁸

The difference, as stated in the Public Service Act and Labour Act 2024, clearly indicates that the provisions of the Labour Act do not cover employment in the public sector, but they are

⁸⁵ Grogan. J "workplace law" 10th ed (Juta & co) 2011 page 320-321.

⁸⁶ Act No. 20 of 1966.

⁸⁷ Ibid note 59.

⁸⁸ Labour Act 2024, Section 75.

concerned only with the private sector. There are many departments in the public sector governed by different statutes, but they are all recognised as public officers. For example, employees in the Local Government are still public officers in terms of Section 154 (1) of the Constitution, and the Public Service Act applies to them even though they are regulated by the Local Government Service Act.⁸⁹ Section 29 (1) of the Local Government Service Act provides that an officer of the Local Government shall not engage in a strike, and whoever contravenes the subsection shall be dealt with under the Disciplinary Code of Government in Public Service Amendment Act 2007.⁹⁰

Section 31 of the same Local Government Service Act is similar to Section 21 of Public Service Act 2005 in that members of local government are free to form and join an association of their choice which is in accordance with section 16 (1) of the Constitution of Lesotho and must be in terms of Societies Act 1966. Such an association will be recognised when fifty per cent of its general body subscribe.⁹¹ Under Section 5 (1), it is indicated that a person shall be appointed to the service on permanent and pensionable conditions following the successful completion of twelve months' probation unlike what is stated in the Labour Act, that a worker shall be employed on probation for a period not exceeding four months.⁹² However, such a period of probation may be extended to a period of one year to a person holding a management or professional position or employed in a professional capacity on agreement.⁹³ The Local Government Service Act and the Public Service Act are still operating statutes, though they have not yet been amended to comply with the requirements and workers' rights stated in Labour Act 2024.

The prevention of public officers from forming or joining a trade union, as stated in the case of the *Lesotho Union of Public Employees*, is to avoid strikes and undeserved behaviour and activities that are unlawful and that take place during strikes. The members of the Lesotho Mounted Police are prohibited from joining a trade union,⁹⁴ but are allowed to form and join an association under Regulation 24,⁹⁵ while the Lesotho Correctional Services have their association. These institutions, together with the Lesotho Defence Force and National Security

⁸⁹ Local Government Service Act No. 2 of 2008.

⁹⁰ Ibid in Section 29 (2).

⁹¹ Ibid on Section 31(3).

⁹² Section 128 (1).

⁹³ section 128 (4) of Labour Act 2024.

⁹⁴ Section 66 (2) (a) (b).

⁹⁵ Regulation 24 of Lesotho Mounted Police Service (Administration) Regulations 2003.

Services, are specifically excluded from the operations of Labour Act 2024, and they are all prohibited to join or form a trade union. The exclusion of security sectors has been a frightening issue among the public officers, something which has been regarded as the government effort to safeguard security and safety for the nation.⁹⁶

3.4 TESTS FOR THE LIMITATION OF RIGHT TO STRIKE, FORM AND JOIN TRADE UNION

The tests laid down in the Canadian case of *Regina v Oakes*⁹⁷ by the Supreme Court were not considered in Lesotho. The requirements for proportionality were not satisfied, leaving the public servants without remedies according to the limitations of Public Service Act 2005 and the High Court of Lesotho in the case of *LUPE*. The tests, as laid down in the Canadian case, are of three-tier proportionality. The first test is that actions approved must be carefully planned, not arbitrary, not unfair or based on unfavourable considerations. Secondly, it is essential that the means, even when rationality is applied to objectives, should minimally impair the right to freedom in question. Furthermore, there must be a proportional relationship concerning the factors of the procedures that restrict the right or freedom and the objective deemed sufficiently important.⁹⁸ Thus the principles of proportionality must be applied in evaluating the justification of the restriction of strike for public officers within a democratic society that upholds the constraints of law.⁹⁹ The collective bargaining and freedom of association rights, as prioritised in the Labour Act, provides that workers and employers shall have a right to form and join any association of their choice in accordance with the regulations of the relevant organisation without needing prior authorisation from the government. This right is assured to all economic sectors of employment, especially the public sector.¹⁰⁰

The right to freedom of association, according to international standards, includes the right to trade unions and the right to strike. Strikes are not considered a right in Lesotho as it is not protected in the Constitution. In the Labour Act, the strike is protected as a mechanism for dispute settlement, more especially when the parties fail to reach an agreement in their

⁹⁶ T Cohen and L Matee, 'Public Servants right to strike in Lesotho, Botswana and South Africa-A Comparative Study' 2014 (17)4 Potchefstroom Electronic Law Journal.

⁹⁷ *Regina v Oakes* 1986 1 SCR 103 (Canada).

⁹⁸ *Ibid.*

⁹⁹ T Cohen and L Matee; Public Servants Right to Strike in Lesotho, Botswana and South Africa- Comparative Study PELJ 1014 (17) 4.

¹⁰⁰ Section 8 of Labour Act 2024.

negotiations in terms of Section 207, read together with Section 42.¹⁰¹ Although stated as a right in the case of the *Lesotho College of Education Staff Union and others v Lesotho College of Education*,¹⁰² there is no legal instrument that guarantees that other than being illegal to engage in a strike under common law, as it amounts to a breach of contract.

The right to strike and freedom of association in the public sector is protected by the Constitution without any discrimination as to the private or public sector employment. The Constitution is silent about the right to strike in Lesotho but provided in Labour Code Order 1992 and re-emerged on the Labour Act. Lesotho had previously regulated the private sector and public sector in two separate legal regimes, being Labour Code Order 1992, which has been now repealed and replaced with Labour Act 2024, regulating the private sector. The Public Service Act does not accommodate the Labour Act. Rather, the Labour Act recognises the public officers' right to form and join an association and a trade union, they emphasise that as a conflict of laws which need a serious interpretation. Lesotho, like other countries, did not recognise the right to freedom of association and right to strike for the public sector, as opposed to the private sector since the inception of labour law. There was a belief that the public sector employers would not be placed on the same footing as employers in the private sector as the public officers were serving the interests of the public, whereas the private sector employees serve individual interests and businesses. The denial of a right to strike for the public officers was deliberately stated in Section 19 of Public Service Act 2005, and the repealed Public Service Act 1995, in Section 35, which prohibited public officers from joining a trade union, resulting in the employment which is divided into two sectors in Lesotho.

The right to form and join public officers staff association by the public officers in terms of Section 22 (1) afforded the public officers a limited right to organise and bargain collectively, as compared to the workers in the private sector. The latter enjoy a wide range of rights to organise and bargain collectively and join trade unions without prior authorisation.

¹⁰¹ Kananelo Mosito. 'Internationalisation of Labour Law: The Lesotho Experience'. Southern African Public Law 35 (1):24.

¹⁰² [2024] LSHC 119.

3.5 SOUTH AFRICAN PERSPECTIVES

In South Africa, the public sector is regulated through Public Service Act 1994.¹⁰³ The Labour Relations Act of South Africa,¹⁰⁴ applies to any employment relationship in the private and public sector to the exclusion of National Intelligence Agencies, South African Secret Agencies and South African Defence Force. The public servants have their own Labour relations policies, and that the Labour Relations Act applies to the public servants only when it is not contrary to such policies. Its promulgation and amendment afford all public servants who have been excluded by other statutory powers and rights to bargain collectively and to protect their right to strike actions.¹⁰⁵ There are cases which dealt with the issue of a right to freedom of association and trade unions and interpretation of the South African Labour Relations Act, mostly the incorporation of the public sector and private sector employment. The most influential case is that of the *South African National Defence Union v Minister of Defence and Another*,¹⁰⁶ where the members of the South African Army were denied freedom to join a trade union and to strike. Like Lesotho, members of the South African Defence Force, were excluded from the scope of the Labour Relations Act, and even the Defence Act had a specific section that denied them the right to trade union and to strike like other employees.

Dissatisfied with the discriminatory sections, they approached the Constitutional Court through their union, challenging the constitutionality of Section 126 (B) (1) of the Defence Act. Those public officers were not satisfied with the provisions of the unjust regulation that denied them a right to join a trade union and to strike, hindering their right to freedom of association or to participate in public protest actions, engaging in collective bargaining in terms of Section 126 (B) (1) of The Defence Act.¹⁰⁷ The said section is similar to Section 3 (2) of Labour Act 2024 of Lesotho, which states that, “this Act shall not apply to a person who is a member of the Lesotho Defence Force, Lesotho Mounted Police Service, National Security Service, and Lesotho Correctional Services.

The Constitutional Court of South Africa ruled that, members of the South African Defence Force be classified as workers in terms of Section 23(2) of the Constitution, even though the

¹⁰³ Proclamation 103 published in GG 15791 of 3 June 1994 South Africa

¹⁰⁴ Labour Relations Act 66 of 1995 South Africa

¹⁰⁵ Labour Relations Act 66 of 1995 South Africa.

¹⁰⁶ [1999] ZACC 7

¹⁰⁷ Act 44 of 1957.

relationship with the South African Defence Force is not identical to an ordinary employment relationship. Section 126 (B) (1) was declared unconstitutional, violation to the fundamental right of the armed forces and the International Labour Organisation Convention 87.¹⁰⁸ It was concluded that the South African Labour Relations Act effectively included every employee under one banner to implement equality within the labour relations and the injustices of apartheid.¹⁰⁹ It was held that the purpose of the Labour Relations Act is to improve socio-economic interests of society by regulating strike, which entails that there will be no further justification or additional limitations to these explicit limitations.¹¹⁰

Thus, the Labour Relations Act,¹¹¹ excluded members of the National Defence Force, National Intelligence Agency and the South African Secret Services from the Public Service Act.¹¹² However, the definition of a worker was extended to those categories while interpreting the rights to strike and collective bargaining for members of the army. It was held in the case of *Public Servants Association of South Africa v Department of Labour Relations*¹¹³ that trade unions are custodians of employees' rights and are aimed at ensuring that citizens could freely associate, either politically or with any other organisation, such as a trade union, with freedom of association being enshrined as a fundamental human right in the Constitution.

Before the constitutional case on *the Union of South African Defence Force*, the recognition of right to freedom of association and trade union henceforth the right to strike by members of the army was not available, and the same situation has been prevailing in Lesotho, following Sections 22 and 30 of Public Service Act 2005, read together with Section 3 (2) of Labour Act 2024 and Section 16 (2) of the Constitution of Lesotho. As noted above, the court in the case of the *Lesotho Union of Public Employees v the Speaker of the National Assembly and Others*¹¹⁴ declared that Section 31 (2) and Section 35 of Public Service Act 1995 were not unconstitutional, stating that the trade unions were both confrontational and unreasonable on the grounds that they usually resorted to strike actions without conforming to the requirements of the law, nor considering the economy of the country.

¹⁰⁸ Budeli M, "Freedom of Association for public sector employees" SAJ.

¹⁰⁹ Ibid note 77 above.

¹¹⁰ Subramanien DC and Joseph JL "The Right to Strike under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA" PER / PELJ 2019(22) – DOI.

¹¹¹ No. 66 of 1995. South Africa.

¹¹² Public Service Act No. 103 of 1994.

¹¹³ [2024] ZALCJHB 172.

¹¹⁴ Ibid Note 59 above.

Both cases cited above deal with the right to freedom of association and the right to strike, whereby the constitutionality of the outlined provisions of national law was at issue. The limitation clause in Section 36 (1) of the South African Constitution was found not applicable to the extent that right to strike and freedom of association for members of the defence force may be limited whereas in Lesotho, His Lordship the Chief Justice L. Kheola ruled that the limitation of rights of public officers in terms of Public Service Act is justified. Such a justification prevails and renders the application of Labour Act 2024 in the public sector unspoken. The arguments raised on behalf of applicants, which were cited with approval, were consistent with the Constitution of Lesotho, which states that the abridgement must not be greater in extent than is necessary in a practical sense in a democratic society. The outcry of the applicant was based on the fact that, Public Service Act 1995 forced the state to deregister the applicant's union as the Public Service Act forbids public officers to join a trade union which the applicant claimed to violate international conventions that Lesotho ratified and incorporated into the now repealed Labour Code Order 1992.

The Report on Freedom of Association and Assembly in the Southern African Development Community region found that the rights guaranteed in Sections 15 and 16 of the Constitution of Lesotho 1993 are not absolute and subject to limitation in the manner prescribed by the international human rights instruments for the protection of law and order, the protection of public health or morals or the protection of the rights and freedom of others.¹¹⁵ The report further highlighted that Lesotho legal framework is in line with international standards, but the practical implementation of the said framework is seriously compromised.¹¹⁶

3.6 Conclusion

The recognition of the right to freedom of association in public sector employment was not regulated in Lesotho until the enactment of Public Service Act 1995, which was later repealed and replaced with Public Service Act 2005. The promulgation of Labour Act 2024 marks a milestone in labour relations for affording employees in the public sector rights, like those in the private sector, as in the right to freedom of association and collective bargaining. On the other hand, the Labour Act has been facing challenges for the public sector employment

¹¹⁵ K. Mosito (n 82).

¹¹⁶ Ibid.

because of some provisions of Public Service Act 2005. The Act has thus posed many challenges over time, raising questions regarding the extent to which the Labour Act would supersede the Public Service Act, whereas specific sections prohibit the application of the Labour Act (previously Labour Code Order 1992) for public officers. The national effort to regulate both the public and private sectors in the same legal framework as that of the Republic of South Africa would probably be futile. As such, there is a need to insert some amendments in Public Service Act 2005 to enhance application of the Labour Act to public officers and afford the public sector the right to strike, and right to trade unions, more especially by removing Clause 3 (2) of Labour Act 2024.

CHAPTER FOUR: CONCEPT OF WORKERS' RIGHTS THROUGH THE LABOUR ACT

This chapter presents the inconsistencies and gaps in the law regulating employment relationships in the public and private sectors through Labour Act 2024. Specifically, the chapter highlights the contradictions between Labour Act 2024 and Public Service Act 2005, thus noting a setback on the parliamentary effort to regulate both the public sector and private sector employment in the same legal framework. It is justifiable that the gaps in law cannot be easily detected without a matter in connection with the incomplete legislation being adjudicated upon.¹¹⁷ The gaps in the national statutes are classified under three categories. The first would be the complete gap in which there is no provision about the case to be judged. Secondly, there is a partial gap, where there is an inadequate coverage to address all requirements of the legal question in law. The legislature should first amend the statutory regulations or adopt new norms, but in exceptional cases, judges may also act as they do only in gaps and fill in the law.¹¹⁸ The third one would be the gaps that result from legislative mistakes, sightedness, careless or tardiness.¹¹⁹ These gaps can emanate from errors in drafting, omissions or failure to foresee all possible circumstances.

The second aspect seems relevant to the labour law system of Lesotho when considered in line with comparative analysis between two conflicting statutes. It has been emphasised that the legal system of Lesotho does not accommodate employment in the private sector and public sector within the same legal framework.¹²⁰ Public Service Act 2005 has been highlighted as designed in a manner to regulate employment relationship only in the public sector in which the disciplined force employees are included and defined as public officers and the repealed Labour Code Order 1992, focusing on the private sector, being rendered inadequate for the newly enacted Labour Act 2024 to regulate employment in both sectors.

There are two major concepts to be dealt with in this chapter. The first is the perception of compiling rules regulating the public sector employment and private sector employment in the same legal framework, as the legislature's unsuccessful attempt to address the right to equality

¹¹⁷ Legal Gaps Concept Content Problems of the Role of Legal Doctrine in Overcoming them
<https://www.researchgate.net/publication/367086590>.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ <https://generisonline.com/a-comprehensive-overview-of-the-legal-system-in-lesotho>.

in the workplace. Secondly, limitation of the public officers to engage in strike and trade unions and exclusion from application of Labour Act 2024 of some of public officers such as members of Lesotho Defence Force, Lesotho Mounted Police Service, Lesotho Correctional Services and members of National Security Services and other departments specified as essential services viewed is another factor affecting recognition of the Labour Act as an instrument regulating both public and private sector employment. Although there are many sections in the statutes regulating the public service which impede the smooth running of the Labour Act, the major concern is based on Section 19 of Public Service Act 2005. The Act prohibits public officers from engaging in a strike, with Sections 21 and 22, regulating the public service staff associations. These provisions are vulnerable to constitutional attack as they subject public sector employees' rights to limitations in terms of Section 16 (1) of the Constitution and by regulating under the provisions of Societies Act 1966. The above highlighted provisions are of universal concern to the public sector employment as they cover significant rights of public officers, thus undermining the constitutional right to equality. The emphasis of Section 8 of the Labour Act gives preference to the Public Service Act towards suppressing the public officers' right to freedom of association without any distinction.¹²¹

As a member of the International Labour Organisation (ILO), Lesotho ratified several international conventions and protocols. The Constitution of Lesotho binds the government to take appropriate measures to encourage the formation of independent trade unions to protect employees' rights and interests, and to promote sound labour relations and fair employment.¹²² It is also provided in the Constitution that every person shall not be deprived of his or her right to enjoyment of freedom of association freely with others either for labour, social, cultural, political, religious, economic or ideological or cultural purposes.¹²³ The enactment of the Public Service Act was to give effect to Section 16 (1) of the Constitution in relation to employment in the public sector whereas the promulgation of the Labour Code Order has been to give effect to the same section of the Constitution, though mainly focusing on the private sector employment.

¹²¹ Emphasis "subject to the rules of organisation concerned on section 8 (1) of Labour Act 2024".

¹²² The Constitution of Lesotho 1993, Section 31.

¹²³ The Constitution of Lesotho. Section 16 (1).

4.2 LIMITATION OF RIGHT TO STRIKE FOR ESSENTIAL SERVICES

Limitation of the right to freedom of association may be in terms of Section 16 (1) and (2) of Essential Services Arbitration Act 1975, which specifies that employees in any essential services shall not take part in any strike. Such essential services are outlined in a schedule under Section 20, as water services, electricity services, health services and hospital services, to mention a few.¹²⁴The Labour Act describes the essential services as the services, the interruption of which will endanger life, personal safety, security, health of the whole or part of the population.¹²⁵ The Essential Services Arbitration Act 1975 was repealed by Labour Code Order 1992, whereby essential services were stated as those confined to undertakings that they provide service whose interruption would endanger the life, personal safety or health of all or any part of the population of Lesotho.¹²⁶ The same definition is attached to Labour Act 2024 after the repeal of Labour Code Order 1992. Therefore, such a definition is wide to the extent that some services are categorised as essentials, whereas they are not.¹²⁷

It is imperative to refer to the Labour Relations (Public Service) Convention 151 (1978), in which it is provided that public employees are entitled to the same civil and political rights as other workers that are necessary for the regular exercise of freedom of association.¹²⁸The above legal framework allows states to limit, to a lesser extent, a right to freedom of association and a trade union when dealing with certain categories of employees. Such are security agencies and workers doing the work that is identified as essential services as recognised by the International Labour Organisation (ILO). The two aspects recognised by the ILO as matters to be considered for limitation of the right to strike in the public sector employment are essential services, which are those that would result in endangering normal living conditions of the population, and secondly on the public service of fundamental importance.¹²⁹ Public Service Act 2005 completely bans the public officers' right to strike without selectivity on whether the public officer is performing work of an essential nature.¹³⁰ The analysis of *Rochelle Le Roux and Tamara Cohen* shows that Lesotho and other countries within the Southern African Development Community, excluding South Africa and Namibia, limit the public sector

¹²⁴ Essential Services Arbitration Act, 1975.

¹²⁵ Section 214 (1) of the Labour Act 2024.

¹²⁶ Labour Code Order 1992, section 232

¹²⁷ *Lesotho workers Association v Ts'epong (Pty) Ltd and Another*, LC/79/2013, Para 18

¹²⁸ Article 5

¹²⁹ Labour Act 2024, section 214

¹³⁰ Section 19 as stated above

employees' right to strike to the extent that the limitation outweighs the scope endorsed by the International Conventions.¹³¹The right to strike within the SADC countries is limited to essential services, which are classified as services whose interruption would endanger the life, personal safety or health of all or any part of the population. The definition of essential services in Lesotho is classified as a failure to distinguish between essential and non-essential employees within the listed services, thus giving a blanket covering and expansion of essential services.¹³²

The provisions of the Public Service Act,¹³³ Labour Code order 1992 and Section 16 (1) of the Constitution cohere with the International Labour Organisation Convention 87 on freedom of Association which recommends member states to formulate and implement a policy in accordance with the national laws.¹³⁴ The case of LUPE empowered the Government of Lesotho to ignore and undermine the importance of public servants' right to organise and bargain collectively. The right to a trade union was referred to as including the right to strike, and reference was made to the previous cases involving the private sector. These include the *Lesotho Union of Bank Employees v Contractors of Lesotho Highlands Water Authority*¹³⁵ whereby the court considered the trade unions to be confrontational and unreasonable. This ruling was in relation to the strike by the *Lesotho Union of Bank Employees*, who appeared on television and admitted that the strike was unlawful, albeit vowing to continue.¹³⁶It was further stated that public officers were not left without remedy when the right to trade union was prohibited, as they have recourse in terms of Section 22 of the Public Service Act that they have the right to form their own public service staff association for collective bargaining.

4.3 THE IMPACT OF LUPE V MINISTER OF PUBLIC SERVICE

The injustices brought about by the case of the *Lesotho Union of Public Employees* (LUPE) remain circumvented to the development of Lesotho labour law for its consideration to ban the

¹³¹ Rochelle Le-Roux and Tamara Cohen, "understanding the limitation to the right to strike in essential and public Service in the SADC Region" Potchefstroom Law Journal (2016) Vol 19

¹³² Section 214 of Labour Act 2024 read together with Labour Code (Amendment Act No. 9 of 1997) as discussed by T Cohen and L Matee, 'Public Servants right to strike in Lesotho, Botswana and South Africa-A Comparative Study' (2014) PELJ Vol 17 No. 4.

¹³³ section 21 read with section 22 of Public Service Act 2005 which allows public officers to form and join public service staff association.

¹³⁴ Regulating Freedom of Association and Right to join trade union for the purpose of collective bargaining and under section 3 of Labour Code Order 1992 employee's organisation is defined as trade union.

¹³⁵ (CIV 8 of 83) 1984 LSCA 99

¹³⁶ *ibid*

right to a trade union for the public servants. Section 22 of the Public Service Act allows public officers to form their staff association for collective bargaining, with certain restrictions. First, the public officers may form their own public officers' staff association in terms of Societies Act 1966. Secondly, the said association would enjoy the recognition by the minister when fifty per cent of its members subscribe. The most fundamental right for the employees for collective bargaining is to engage in a strike, while Section 19 of the PSA prohibits public officers from engaging in a strike. Professor Mosito highlighted a right to strike as a form of a dispute settlement mechanism and a necessary corollary to collective bargaining which workers resort to when negotiations reached a deadlock.¹³⁷ He expressed a concern over the decision of the *Lesotho College of Education Staff Union and others v Lesotho College of Education* where it was emphasised that the right to strike is a fundamental right of workers, and is protected by law for the purpose of collective bargaining; nevertheless, surprisingly there was no provision in any piece of legislation that indicates that.¹³⁸ That was then the major concern affecting employees in the public sector, and such a right is not specifically included in Labour Act 2024, though specified in the Public Service Act that it is misconduct for public officers to engage in strike.

The reconciliation of rights of employees in the private and public sectors in the same instrument, as in the Labour Act, left some gaps, thereby highlighting a need to rearrange to cater for uniformity in administering the application of the labour laws. Apparently, some government departments are complex to the extent that national secrets and security are entrusted to them. Yet on issues of unfair labour conduct, they may have no choice of collective bargaining as they cannot be members of any trade union. Although the workers' rights are contained in both Public Service Act 2005 and Labour Act 2024, there are three categories of public officers who could not enjoy the same rights as could other workers. First, it would be the workers specified in Section 3 (2) of Labour Act. Secondly, it is those falling under parameters of Section 220, identified as essential services, and the last category involves the members of the judiciary, specifically judges and magistrates.

The provisions of Labour Code Order 1992 were visited several times by the courts. At the stage, one would say they conform with the international standards, though with the Act itself not necessarily conforming fully with international recommendations. It was held in the case

¹³⁷ Kananelo Mosito, "The internationalisation of Labour Law, Lesotho Experience" 2020 SABINET Vol 35 1

¹³⁸ Ibid note 120.

of the *Lesotho Revenue Authority Staff Union v Lesotho Revenue Authority*¹³⁹ that every person has the right to participate in forming a trade union, to join a trade union and to participate in its lawful activities whereas the International Labour Organisation's Convention on collective bargaining entails determination of working conditions and terms of employment, regulating relations between employers and workers and regulating relations between employers or their organisations and workers organisations.¹⁴⁰ Section 3(2) of the Labour Act impacts negatively on the members of the Lesotho Defence Force, Lesotho Mounted Police Services, National Security Services and Correctional Officers, by not considering the role they play as those who can be regulated in the same manner as can other employees. Being excluded from application of the Labour Act explicitly limits their right to form and join a trade union and form any other work organisation and employees' association than the one specified in Public Service Act 2005 and their administrative Act, such as the Police Service Act for members of the Lesotho Mounted Police Service.¹⁴¹ There is a conflict between Public Service Act 2005 and Labour Act 2024 to the extent that the general preamble of the Labour Act cannot be viewed as mandated to cater for all work organisations to include public officers.¹⁴²

The right to join a trade union and to strike was successfully challenged in the Constitutional Court of South Africa in the case of the *South African National Defence Union v the Minister of Defence (SANDU)*¹⁴³ in which Section 126B (1) of *Defence Act 1957* was declared unconstitutional for prohibiting a trade union within the members of the South African National Defence Force, based on the recommendations of the International Labour Organisation. It is highlighted that the Labour Relations Act (LRA) is silent about the duty to bargain collectively on every trade union, employers' organisation and employer, but such a right is acquired through the Constitution.¹⁴⁴ The Constitution of South Africa confers a right to organise and collectively bargain. For a trade union to engage in strike action, such a right is regulated by national legislation and can also be limited in terms of Section 23 (5) of the Constitution of

¹³⁹ [2017] LSLC 8 page 2; Labour Code (Amendment) Act, 2000, section

¹⁴⁰ Ibid at para 5.

¹⁴¹ Police Service Act No 7 of 1998.

¹⁴² The preamble of Labour Act 2024 is of the view that the Act aimed at ensuring compliance with fundamental principles and rights at work and other relevant international instruments.

¹⁴³ *South African National Defence Union v Minister of Defence* [2024] ZALCJHB 172.

¹⁴⁴ Grogan. J "Collective Labour Law" 3rd ed (Juta) 2019 at 135.

South Africa 1996.¹⁴⁵ Public Service Act 2005 should be revisited and revised to cater for the rights of workers in the same manner as those in the private sector. For example, judicial officers in Lesotho are considered public officers, but they cannot find comfort in the Labour Act as it would not be possible to form and join a trade union and be members of the Public Service Staff Association based on the provisions of administration of the Judiciary Act¹⁴⁶ that empowered the Chief Justice as the Head of Judiciary to make regulations governing the administration of Judiciary.¹⁴⁷

Notwithstanding the enacted Labour Act, the impact of the Public Service Act cannot be disregarded if not revised to give effect to the Labour Act to the extent that the right to organise and collectively bargain and the right to form and join an association have a specific definition when it focuses on the public sector. It will not be possible for the Labour Act to supersede the Public Service Act in relation to the right to strike and to trade unions, because the public sector is governed by the Public Service Act, which is not applicable to the private sector.¹⁴⁸

CHAPTER FIVE: CONCLUSION

5.1 ANALYSIS OF THE SCOPE

This study hypothesised that, the Labour Act 2024 could not accommodate both public and private labour law systems without difficulties. The labelled obstacles are the provisions of Public Service Act 2005. It was stated later that the situation had been fuelled by the case of LUPE and Section 16 (1) of the Constitution. As stated in Chapter Two, Labour Act 2024 was promulgated during the national socio-economic challenges. The Act has faced resistance from Public Service Act 2005, concerning the public sector's right to organise and collectively bargain. Compared to South Africa, regulating the public sector and private sector employment with a focus on the workers' rights seems incompatible, as the decision of the Constitutional Court of South Africa in the case of the *South African National Defence Union v the Minister*

¹⁴⁵ D du Toit and others, "LABOUR RELATIONS ACT" A Comprehensive Guide. 5th ed Lexis Nexis, 2006 at 184.

¹⁴⁶ Administration of the Judiciary Act, 16 of 2011.

¹⁴⁷ Section 29 of Administrative of The Judiciary Act 2011.

¹⁴⁸ South Africa Labour Relations Act in section 14 recognised public service bargaining councils that existed in terms of public service labour relations Act 1994.

of Defence brought in significant changes to the national law. It has been observed that, under common law, the employment relationship was between the employer and worker. As such, the employer had control over the employees, supplied tools and materials to the employees, and paid them salaries. That means in the absence of trade unions and employment organisations, the employer was at liberty to terminate the relationship at any time if they had reasons that were not prohibited by law, owing to their powers that far outweigh those of the workers.

5.2 REFORMS FOR INCLUDING THE PUBLIC SECTOR IN LABOUR ACT 2024

As noted earlier, Labour Act 2024, which came into operation on the 2nd day of April 2024, has been a revolutionary statute reconciling the public sector with the private sector employment. In collaboration with Public Service Act 2005, the state's effort to advance Lesotho labour law is accomplished to the extent that employees' rights, as entrenched in the Constitution, are cherished. The Labour Act extended the workers' rights to include the rights of informal workers, domestic workers and employment of children. The Public Service Act is designed in a manner to regulate employment in the public sector to the exclusion of the private sector. According to the complexity of procedures and administrations of the public sector, it would be impossible to address the conflict of laws towards the protection of workers' rights. I have already indicated that the right to organise and collectively bargain hit a rock to be administered by the Labour Act for the public officers without revising Section 19 of Public Service Act 2005 to allow the public officers to engage in strikes and trade unions. Without excluding Societies Act 1966 and the threshold of fifty per cent for the public officers' staff association,¹⁴⁹ the conflict would remain a challenge as the Labour Act cannot supersede the Public Service Act, even though the Labour Act contains the section that gave it power over other legal instruments.¹⁵⁰

It has been indicated that the Labour Act was promulgated based on the recommendations of the International Labour Organisation and in terms of the Constitution of Lesotho. It is a commendable legislation that meets the threshold of the international standards, though its coverage is limited to the workers in the private sector. As for public officers, the Public Service Act conflicts with Labour Act 2024 to keep public officers' rights in a different category. The

¹⁴⁹ Public Service Act 2005, section 22 (1)(2)

¹⁵⁰ Labour Act 2024, Section 221 (1)

definition of employment in the public sector cannot be conclusive without encountering the rights and freedoms recommended by the international framework, and to a certain extent, the Labour Act 2024 fraternity.

Without the amendment of Public Service Act 2005, specifically in Section 19, which prohibits the public officers from engaging in a strike, Sections 21 and 22 which afford public officers to form and join the Public Officers' Staff Association, which must be under Societies Act 1966, and the recognition by minister, with the minimum of fifty per cent of subscribing public officers, the smooth application of law to the public officers' rights is objectively undermined. Such provisions of the Public Service Act need to be revisited and revised to accommodate the Labour Act and align with International Labour standards.

5.3 SHORTFALLS OF THE LABOUR ACT TO COMPLY WITH INTERNATIONAL STANDARDS

Labour Code (Codes of Good Practice),¹⁵¹ is intended to assist employees and their trade unions, employers and their organisations, councillors and arbitrators who must apply the law and the assessors of the Labour Court and the Labour Appeal Court.¹⁵² The Code is the applicable law that constitutes policy and best practice for Labour Code Order 1992 and even extends to Labour Act 2024.¹⁵³ The public sector is divided into departments dealing with different tasks, some of which are categorised as essential, while others are considered security emergencies. The judiciary is another sector that has not enjoyed the rights defined in the Labour Act, even though they are considered as public officers. In the case of *Makoa v Lesotho Highlands Project Contractors and others*,¹⁵⁴ it was held that countries that ratified the International Labour Organisation Convention No. 98 undertake to take measures to promote collective bargaining and that employees are entitled to bargain through their trade unions.¹⁵⁵ The case of *LUPE* justified the limitation of public officers' right to avoid strikes and not to join trade unions. It was expressly stated that public officers cannot be members of trade unions in the repealed Public Service Act 1995. The clause is not included in the Public Service Act 2005, though that is not a guarantee that public officers can be members of a trade union.

¹⁵¹ Legal Notice No 4 of 2003.

¹⁵² Labour Code (Codes of Good Practice) Notice 2003, Section 2.

¹⁵³ Labour Act 2024, Section 220 (1).

¹⁵⁴ [1995] LSLC 7.

¹⁵⁵ (LC 15 of 94) [1995] LSLC 7 (27 April 1995) at page 3.

Section 8 of Labour Act 2024 specifically applies to public officers. However, the words “subject only to the rules of the organisation concerned” are strong to the extent that they refer public officers’ association to the mandate of Societies Act 1966, not in the context of labour law. The international labour standards require states to protect and promote the rights of workers both in the private sector and the public sector. The labour law of Lesotho is not readily accommodating the public sector in the same manner as is the private sector, and some adjustments towards specified limitations are needed to conform to international labour standards. It was held in the case of the *Minister of Home Affairs and others v ‘Mampho Mofolo’* that the parliament should have clearly stated in the enactment of Police Service Regulations 2003 that they intended to exclude police officers from all the provisions of the Public Service Act, as the possible implication falls short of being irresistible.¹⁵⁶ In the case of *Mokoena Makhetha and 21 others v Commissioner of Police and others*,¹⁵⁷ it was held that Public Service Act 2005 apply to members of the Lesotho Mounted Police Service in terms of Section 137 (3) of the Constitution, but excluded for appointments, disciplinary and removal by the Public Service Commission.

The members of the judiciary, specifically Judges of the High Court and Court of Appeal, commanders of the Lesotho Defence Force and Commissioner of Police are excluded from the purview of Public Service Commission for the purposes stated above. They are still public officers in terms of Section 154 (1) of the Constitution. The exclusion from the application of Labour Act 2024 of members of disciplined forces and security agencies is based on the issue of right to organised and collective bargaining, which is limited to recognition of fifty per cent of its general body and not based on the International Labour Organisation Recommendation but under the armpit of Societies Act 1966.¹⁵⁸

The frustration that may be brought about by the newly enacted legislation was seen in the case of *Apollo tyres*¹⁵⁹ when interpreting Section 186 (2) of the Labour Relations Act of South Africa in the explanation of employees’ benefits. It was emphasised that the term *benefit* was intended to refer to advantages conferred to employees which did not originate from contractual or

¹⁵⁶ [2005] LSCA 12 at page 24.

¹⁵⁷ C OF A (CIV) NO: 86/2022 at para 16.

¹⁵⁸ Public Service Act 2005, section 21 (2).

¹⁵⁹ (Pty) Ltd v CCMA [2013] ZALAC 3.

statutory entitlement, but which has been granted at the employer's discretion. However, that was not the accepted interpretation throughout the case.¹⁶⁰

The newly enacted Labour Act comprehends the Constitution of Lesotho in Section 31, which is the clause aimed at protecting workers' rights and interests, as it states that,

“Lesotho shall take appropriate steps to encourage the formation of independent trade unions to protect workers' rights and interests and to promote sound labour relations and fair employment practices”

The excluded members of public employment will not enjoy the benefits provided in the Labour Act as it concerns membership of any trade unions, which is not provided for in the Public Service Act¹⁶¹ or Code of Good Practice,¹⁶² that was enacted in terms of Section 240 of the repealed Labour Code Order¹⁶³ and the Labour Code (Code of Good Practice).¹⁶⁴

5.2 RECOMMENDATIONS

Based on the above exposition and findings of the study, the following would be recommended by this study. That the legislature intended to regulate both public sector employment and private sector employment in the same legal framework, the point of departure would be to consider the recommendations of the International Labour Organisation. Freedom of Association and Protection of the Right to Organise Convention confers on the employers and workers the right to establish and, subject to the rules of organisation concerned, to join organisations of their choosing without any previous authorisation.¹⁶⁵ The Labour Act accommodates the public sector in the same way as the private sector regarding the formation of associations for collective bargaining,¹⁶⁶ but the Public Service Act takes precedence over the Labour Act because of the direction to the repealed Labour Code Order now replaced with Labour Act 2024.¹⁶⁷

The public Service Act and other statutes regulating departments of the public sector to a certain extent conflict with the Labour Act. As such, there is a need for further amendments, especially

¹⁶⁰ Ibid at para 50.

¹⁶¹ Public Service Act No 1 of 2005.

¹⁶² Legal Notice No 194 of 2008.

¹⁶³ No 24 of 1992.

¹⁶⁴ Labour Code (Code of Good practice) Legal Notice No, 4 of 2003

¹⁶⁵ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Article 2.

¹⁶⁶ Section 8 of Labour Act 2024.

¹⁶⁷ Section 30 of Public Service Act 2005.

to Sections 21 and 22 of the Public Service Act, to do away with Societies Act 1966 for the public officers to enjoy a right to organise and freedom of association that is congruent with the international labour standards. There must be a specific clause in the Public Service Act that the Labour Act should apply to the public sector, other than conflicting Sections 3 and section thirty of the Public Service Act. It would be in the best interests of the statute to limit the right to strike to employees doing work of an essential nature, rather than having a blanket coverage denying the public officers' engagement in a strike.¹⁶⁸

Without adhering to the stated concerns, the application of the Labour Act 2024 to public sector will be limited to administrations and procedures of the Labour Courts and directorate of Dispute Prevention and Resolutions (DDPR) and is not promulgated in a manners to address the workers rights as recommended by the International Labour Organisations (ILO) and other international bodies such as Southern African development Community (SADC).

¹⁶⁸ Public Service Act 2005, section 19.

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